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IN THE

Supreme Court of the United States

_____ TERM, 1970

No. 1209

JOHN L. BROWN,

Petitioner

VS

UNITED STATES OF AMERICA,

Respondent

CLEVELAND JOHNS,

Petitioner

VS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HOMER EUGENE BOSTICK
Suite 314
American Federal Building
Macon, Georgia 31201
Counsel for Petitioner

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IN THE

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JOHN L. BROWN

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UNITED STATES OF AMERICA,

Respondent

CLEVELAND JOHNS,

Petitioner

VS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners John L. Brown and Cleveland Johns most respectfully petition this Honorable Court to grant the Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Middle District of Georgia, Americus Division, was entered on the 29th day of January, 1969, as to petitioners John L. Brown

and Cleveland Johns, and is not reported, but is printed in the record filed with the clerk of the Court of Appeals as to John L. Brown, (R.-101-102) and as to Cleveland Johns, (R-103-104).

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming said judgment, was filed December 23rd, 1969, and is not yet reported but is set forth in the appendix hereto.

On January 26, 1970, on application of attorney Homer Eugene Bostick, Associate Justice Hugo L. Black ordered that the time for filing a petition for Writ of Certiorari in the Brown case be extended to and including February 21, 1970. (Appendix D). By letter dated February 6, 1970, from the office of the Clerk of the Supreme Court of the United States, Attorney Bostick was informed that the order extending the time of filing date January 26, 1970, had been amended to include Cleveland Johns. (Appendix E).

STATEMENT OF GROUND ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254 (1).

QUESTION PRESENTED FOR REVIEW

Was it a denial of Due Process under the Fourteenth Amendment of the Constitution of the United States to defendants unfamiliar with the locale where they were appearing for arraignment on a criminal charge, not having been prior to arraignment furnished with a copy of the indictment against them whereas other defendants appearing for arraignment with attorneys had been furnished a copy of the indictment against them after having been given a copy of the indictments against them and stating they desired to employ counsel, for the Court to require them to employ counsel and appear back for arraignment in 45 minutes?

STATUTES INVOLVED

28 U. S. Code, Sect. 1254, (1) Appedx. G.

United States Constitution Amendment XIV. Appedx. G.

STATEMENT OF THE CASE

John L. Brown and Cleveland Johns were charged in a one count indictment filed August 5, 1968 alleging that on or about January 30, 1968, in the Americus Division of the Middle District of Georgia, and within the jurisdiction of this Court, John L. B. Brown, R. L. Glass, and Cleveland Johns, hereinafter referred to as defendants, did unlawfully, knowingly and wilfully have and possess certain property intended for use in violating the provisions of the Internal Revenue Code, that is to say, the defendants possessed 79 bales of sugar, 400 pounds of wheat bran and 46 pounds of yeast, all of said property being possessed then and there by the defendants with the intent to use the same in the nontaxpaid distilled spirits business; all in violation of 26 USC 5686(a). (R.1,2).

Both defendants appeared in Americus, Georgia in the United States District Court for the Middle District of Georgia, Americus Division at 10:00 A.M. January 13, 1969 for arraignment on the indictment against them. After the defendants were given a copy of the indictment against them, they stated they desired to employ counsel whereupon the Court gave them forty-five minutes to an hour to hire an attorney and see if they were not in position to enter a plea. (TOA-2-7). One hour and fifty minutes later at 11:50 A.M. both defendants through attorney William E. Smith of Americus, Ga., entered a plea of not guilty to the indictment. (TOA-7) (R-2). On January 27, 1969 trial ensued and the jury returned a verdict of guilty as to both defendants. (R.-97, 98). On January 29, 1969 the trial Court entered judgment of conviction and sentenced petitioner John L. Brown to serve twelve months imprisonment and petitioner Cleveland Johns to serve six months im-

prisonment to begin when he was released to Federal Custody by State Authorities (R-100-105). On the same date, January 29, 1969, both defendants filed notice of appeal. (R.-105-107). The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on December 23, 1969. (Appendix Band C). On January 26, 1970, on application of attorney Homer Eugene Bostick, Associate Justice Hugo L. Black ordered that the time for filing a petition for Writ of Certiorari in the Brown case be extended to and including February 21, 1970. (Appendix D). By letter dated February 6, 1970, from the office of the Clerk of the Supreme Court of the United States, Attorney Bostick was informed that the order extending the time of filing dated January 26, 1970, had been amended to include Cleveland Johns. (Appendix E).

STATEMENT OF FACTS

The facts material to the consideration of the question presented by this petition are found in the record filed with this petition and a transcript of arraignment proceedings as to John L. Brown and Cleveland Johns held January 13, 1969, reported by the Official Reporter for the U. S. Courts for the Middle District of Georgia and appended to this petition as Appendix F. It is to be noted that these arraignment proceedings were not transcribed until January 17, 1970 and were not before the United States Court of Appeals for their consideration.

The facts necessary for a consideration of the question are as follows:

1. Both defendant Brown and Johns appeared at 10:00 A.M. on January 13, 1969, in Americus, Georgia, for arraignment without an attorney. (TOA-2).

2. Both defendant Brown and Johns wanted a lawyer to represent them. (TQA-2,3).

3. Both Brown and Johns were unfamiliar with the locale in which they found themselves. (TOA-3). Brown being from

Hawkinsville, Georgia, and Johns being from Warner Robins, Georgia (R-5).

4. Although the indictment was filed August 5, 1968 (T-1), on January 13, 1969, neither Brown or Johns had been furnished a copy of the indictment against them. (TOA-3,4).

5. Neither Brown or Johns knew what the charges were against them. (TOA-3).

6. Other defendants at arraignment represented by attorneys had previously been furnished a copy of the indictment through their attorney. (TOA-3,4,5).

7. Even though both Brown and Johns were in a locale unfamiliar to them, the Court gave them forty-five minutes to an hour to get an attorney. (TOA-7).

REASONS FOR GRANTING THE WRIT

The decision herein is not in accord with the applicable decisions of this Court.

The judgment of the Courts below if permitted to stand will result in prejudice to the substantial rights of the petitioners and to other persons whose cases are handled in a similar way, contrary to the principles of Due Process under the Fourteenth Amendment.

The requirement of notice is engrained in the concept of due process; notice is sometimes essential so that the citizen has a chance to defend charges; it is required before property interests are disturbed, before assessments are made, before penalties are assessed, where a penalty or forfeiture might be suffered for a mere failure to act, and is equally required where a person, wholly passive and unaware of any wrongdoing, is charged with a criminal offense. Lambert v California, 355 US 225.

Due process requires the right in a criminal case to be adequately advised of charges, a reasonable opportunity to meet

the charges by way of defense or mitigation, representation by counsel, and an adequate opportunity to call witnesses. Ungar v Sarafite, 376 US 575.

What due process requires in one situation may not be required in another, because the least change of circumstances may provide or eliminate fundamental fairness. Crooker v California, 357 US 433.

No hard and fast rule can be laid down as to what is, or is not, due process. The pattern of due process is picked out in the facts and circumstances of each case. Brock v North Carolina, 344 US 424.

Due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise. Kinsella v United States, 361 US 234.

Due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct. Breithaupt v Abram, 352 US 432.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,
HOMER EUGENE BOSTICK
Counsel for Petitioners.

P. O. Address:
Suite 314
American Federal Building
Macon, Georgia 31201

UNITED STATES OF AMERICA
GEORGIA, BIBB COUNTY:

This is to certify that I have, this 18th day of February, 1970, caused to have been transmitted by due course of mail, properly stamped, and by air-mail, properly stamped and addressed, a printed copy of this petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D.C. 20530, as provided by Rule 33 and that I further certify I have mailed, properly stamped and addressed a copy of this petition for Writ of Certiorari to the Honorable William J. Schloth, United States District Attorney and the Honorable Walker P. Johnson, Assistant United States District Attorney for the Middle District of Georgia to their post-office address, Old Post Office Building, Macon, Georgia 31202, as Counsel for Respondent, the United States of America.

This the 18th day of February, 1970.

Homer Eugene Bostick

HOMER EUGENE BOSTICK
Counsel for Petitioners

P. O. Address:
Suite 314
American Federal Building
Macon, Georgia 31201

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27333
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN L. BROWN,
Defendant-Appellant.

No. 27334
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CLEVELAND JOHNS,
Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Georgia

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(December 23, 1969)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: This case is of the genus, perennially with us, which questions the sufficiency of the evidence for the jury to convict the defendants of possessing sugar, bran, and yeast intended for use in the non-tax distilled spirits business in violation of 26 U.S.C.A. § 5686(a).[1] A jury found the defendants guilty and we affirm.[2]

Cleveland Johns, one of the appellants here, arranged with a grocer in Marshallville, Georgia, to purchase unusual amounts of sugar, wheat bran, and yeast. The arrangement between Johns and the grocer contemplated that the goods would be delivered to the grocer's home, not his store. Johns would then go to the grocer's home in the early hours of the morning, pay for the sugar, wheat bran, and yeast, and load these goods into two cars.

Early in the morning on January 30, 1968, the day of the arrest, A. L. Glass, a co-defendant who entered a plea of guilty, and John Brown, also an appellant herein, were riding

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[1] §5686. Penalty for having, possessing, or using liquor or property intended to be used in violating provisions of this chapter

(a) General.—It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

[2] Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy v. Houma Well Service*, 5 Cir. 1969, 409 F.2d 804, Part I; and *Huth v. Southern Pacific Company*, 5 Cir. 1969, ____ F.2d ____, Part I [No. 27439, Oct. 7, 1969].

in a Chrysler. Johns was in a Ford. Johns drove past the grocer's house, then returned and loaded a box into the Ford, drove away, and then returned again. Johns got out of the car, flashed a light around the area, and then drove away once again. Johns then met Glass and Brown, and both cars went to the grocer's house. There the three men loaded sugar, bran, and yeast into the two cars. When this was finished, Glass left in the Chrysler; about ten minutes later Johns and Brown left in the Ford. The officer watching the grocer's house radioed other investigators when the men drove off. One group of officers stopped the Chrysler, and Glass was arrested as he attemped to flee. Other investigators followed the Ford and arrested Johns and Brown after their car ran into a tree during the ensuing chase. After Johns was advised of his rights, he again attempted to escape. Later, he denied that he knew Glass or that he had picked up the supplies of Marshallville. When searched, Johns had in his billfold a piece of paper on which was written a telephone number and the name "Ed." The number belonged to Ed Walters, a known liquor violator. The Ford and the Chrysler, both equipped with heavy duty coil overload springs, contained seventy-nine bales of sugar, four hundred pounds of wheat bran, and forty-six pounds of yeast.

At trial Johns testified that Brown was along only to drive and load the car. He denied being in the illicit whiskey business but admitted a conviction for such in 1965. He claimed that the goods in question here were purchased for resale to a person unknown to him but who would call him on the phone. On the basis of this evidence the jury found both Johns and Brown guilty of violating § 5686(a). They now appeal, claiming the evidence was insufficient to support this verdict.

Although no motion for acquittal was presented to the court on behalf of either Brown or Johns, as required by Rule 29, Federal Rules of Criminal Procedure, we have nevertheless followed the example of *Brookins v. United States*, 5 Cir. 1968,

397 F.2d 261, *cert. denied*, 393 U.S. 952, and examined the record carefully.[3] Finding the evidence sufficient to support the conviction, we affirm.

Conviction under § 5686(a) requires proof of two matters, possession of the property and intention that the property be used in violation of the Internal Revenue Code. *Adams v. United States*, 10 Cir. 1967, 375 F.2d 635, *cert. denied*, 389 U.S. 880. Although the evidence of these elements is here inferential and circumstantial, this does not proscribe a finding of guilt. *Sykes v. United States*, 5 Cir. 1966, 373 F.2d 607. In this type of case, we may reverse only where the jury would be compelled to conclude from the evidence that there were reasonable hypotheses of innocence. In other words, if the evidence is such that the jury could have believed that the defendants were guilty beyond a reasonable doubt, then the jury verdict must stand. *Holland v. United States*, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150; *Strauss v. United States*, 5 Cir. 1963, 311 F.2d 926, *cert. denied*, 373 U.S. 910; *Vick v. United States*, 5 Cir. 1954, 216 F.2d 228.

The evidence before us is sufficient to meet this test. To hypothesize these appellants as innocent possessors of sugar, bran, and yeast for sale would be farcically naive. The surreptitious pre-dawn pickups from a private residence by a non-retailer of a large quantity of commodities used in distilling, followed by flight, disingenuous explanations, and connections

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[3]Where no motion is filed pursuant to Rule 29, there is some authority that the court cannot inquire into the sufficiency of the evidence except in the case of "manifest error" or a "miscarriage of justice." *Tomley v. United States*, 5 Cir. 1958, 250 F.2d 549, *cert. denied*, 356 U.S. 928; *Moomaw v. United States*, 5 Cir. 1955, 220 F.2d 589. On the other hand, there is also authority that the rule is not this strict. *Hall v. United States*, 5 Cir. 1961, 286 F.2d 676, *cert. denied*, 366 U.S. 910; *United States v. Renee Ice Cream Co.*, 3 Cir. 1947, 160 F.2d 353; *Collins v. United States*, 5 Cir. 1933, 65 F.2d 545.

with a known liquor violator indicate that both Brown and Johns possessed the property during the loading and transportation with the intent that it be used in the illegal distilling business. This is sufficient to warrant the jury's conviction and our affirmance. See *Williams v. United States*, 5 Cir. 1966, 361 F.2d 280; *United States v. Sawyer*, 4 Cir. 1961, 294 F.2d 24, *cert. denied*, 368 U.S. 916; *United States v. Skinner*, 2 Cir. 1959, 272 F.2d 606; *Chapman v. United States*, 5 Cir. 1959, 271 F.2d 593, *cert. denied*, 362 U.S. 928; *DeHart v. United States*, 4 Cir. 1956, 237 F.2d 227. Neither we nor the jury are compelled to stultify our common sense and accept an unreasonable hypothesis of innocence such as that suggested by the appellants.

AFFIRMED.

A True Copy:
Teste:
(Seal)

EDWARD W. WADSWORTH
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27333
Summary Calendar

D. C. Docket No. 1618

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN L. BROWN
Defendant-Appellant,

Appeal from the United States District Court for the Middle District of Georgia.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 23, 1969

Issued as Mandate:

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27334
Summary Calendar

D. C. Docket No. 1618

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CLEVELAND JOHNS,
Defendant-Appellant,

Appeal from the United States District Court for the Middle District of Georgia.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 23, 1969

Issued as Mandate:

APPENDIX D

Supreme Court of the United States

No._____

October Term, 1969

JOHN L. BROWN,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 21, 1970.

/s/ Hugo S. Black
Associate Justice of the Supreme Court of the United States

Dated this 26th
day of January, 1970.

APPENDIX E

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

February 6, 1970

AIRMAIL

Homer E. Bostick, Esquire
Suite 314
American Federal Building
Macon, Georgia

RE: *BROWN v. U.S., O.T. 1969*

Dear Mr. Bostick:

Confirming our recent telephone conversation, you are informed that the order signed by Mr. Justice Black on January 26th, extending the time for filing a petition for writ of certiorari to February 21, 1970 has been amended to include the name of Cleveland Johns.

Very truly yours,
JOHN F. DAVIS, Clerk

By
Michael Rodak, Jr.
Deputy Clerk

MRJr:bs

cc: Honorable Erwin N. Griswold
Solicitor General of the
United States
Department of Justice
Washington, D. C.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

Criminal
No. 1618

UNITED STATES OF AMERICA

versus

JOHN L. BROWN, R. L. GLASS,
and CLEVELAND JOHNS,

Defendants

Presiding

HON. J. ROBERT ELLIOTT,
United States District Judge
Americus, Georgia

JANUARY 13, 1969.

Appearances:

For *Government:* MR. FLOYD M. BUFORD,
United States Attorney,
MR. WALKER P. JOHNSON, JR.
Asst. U. S. Attorney, Macon, Ga.

For Defendant
Brown-Johns: MR. WILLIAM E. SMITH,
Smith, Crisp & Hargrove,
P. O. Box 227, Americus, Ga.

For Defendants
Glass: No appearance by Defendant

Reported By

CLAUDE JOINER, JR.,
Official Reporter, U. S. Court,
P. O. Box 94, Macon, Ga. 31202

Right to Counsel

AMERICUS, GA. 10:00 A.M. JANUARY 13, 1969

THE COURT: You say everybody is in the courtroom, Mr. Marshal?

THE MARSHAL: Except those in custody, Judge, downstairs.

THE COURT: Now, you have a right to be represented by an attorney when you appear here to enter a plea, if you wish to be represented by an attorney. It is not necessary, you do not have to be represented by an attorney if you want to go ahead and enter a plea without being represented by a lawyer; it is perfectly all right; many people do that. If that is what you want to do, you may do it.

However, if you wish to be represented by a lawyer, you have a right to be so represented. Of course, if you want to be represented by a lawyer, the best thing for you to do is to hire a lawyer, pay him for his services; it's best for you and best for him. However, if you wish to be represented by a lawyer and it appears to me that you are not financially able to employ one, it then becomes my duty to ask some lawyer to represent you without you paying him for his services. So, it's a question of whether you want to be represented by a lawyer. . . .

THE MARSHAL: Case. No. 4: John L. Brown, R. L. Glass, Cleveland Johns. Come around.

Is R. L. Glass in court? (Marshal calling for R. L. Glass outside courtroom). . . . Your Honor, they say that R. L. Glass is not here.

MR. JOHNSON: We will check on that, Your Honor.

Cleveland Johns, I'm going to hand you a copy of the charges against you and John L. Brown, I am going to hand you a copy of the charges against you:

Brown, do you have a lawyer?

DEFT. BROWN: No Sir.

MR. JOHNSON: Johns, do you have a lawyer?

DEFT. JOHNS: No Sir.

MR. JOHNSON: Did both of you hear what His Honor had to say concerning a lawyer? Mr. Brown?

DEFT. BROWN: Yes sir.

MR. JOHNSON: And Johns?

DEFT. JOHNS: Yes sir.

MR. JOHNSON: John L. Brown, do you want a lawyer to represent you or would you rather appear without a lawyer?

DEFT. BROWN: Well, I want one to represent me.

MR. JOHNSON: You do?

DEFT. BROWN: Yes sir.

MR. JOHNSON: Cleveland Johns, do you want a lawyer to represent you or would you rather appear without one?

DEFT. JOHNS: Well, I would like to have a lawyer.

MR. JOHNSON: All right, John L. Brown, can you afford to hire a lawyer?

DEFT. BROWN: No sir.

MR. JOHNSON: Cleveland Johns, can you afford to hire you a lawyer?

DEFT. JOHNSON: Well, I think we were going to see about trying to get a lawyer. I wanted to find out about the charges and all before we did; and since we are not familiar with this part of the country, we would like for you all to represent us a good lawyer, a pretty good lawyer and we would like to get a lawyer.

THE REPORTER: I didn't understand him.

MR. JOHNSON: You want to try to hire you a lawyer?

DEFT. JOHNSON: We want to try to hire one.

MR. JOHNSON: Then, are you prepared to enter a plea at this time?

DEFT. JOHNSON: Well, what's the charges they've got against us?

MR. JOHNSON :Well, you're charged in one count—

THE COURT: Hasn't this man had a copy of the indictment before this?

MR. JOHNSON: No Sir, I'm sure he has not.

THE COURT: Well, why hasn't he?

MR. JOHNSON: The indictments are mailed out to attorneys when we find out they are representing individuals.

THE COURT: You mean you haven't mailed him a copy of the indictment?

MR. JOHNSON: No sir.

THE COURT: Give him a copy of the indictment and call the case later and give him a chance to see it. I don't understand that procedure; you mean if a man is not represented by a lawyer, you don't mail him a copy of the indictment?

MR. JOHNSON: Just as a matter of form, no sir.

THE COURT: Well, as a matter of form, I want you to start mailing them copies. How is a man going to know, when you write him and tell him to come here for arraignment, how is he going to know what he's charged you if you don't mail him a copy of the indictment? Is he supposed to read about it in the New York Times?

MR. JOHNSON: No sir, I don't think so.

THE COURT: Mr. Buford, just a minute! I want to talk about that a little further; is that the practice?

MR. BUFORD: Your Honor, it has been that way ever since I've been in the District Attorney's office. I would call it to Your Honor's attention that I would estimate anywhere from 85 to 90 per cent of the criminal cases that we have in court, they are formally carried before the United States Commissioner and a formal charge is filed against the defendant there; stolen car, he's charged with stolen car, given an opportunity to have a hearing and sometimes they do have hearings. And we have always felt—maybe we are wrong—maybe we're in error, when they are acquainted with the charges of that nature, they know the general nature of the charge and frequently we have, when we get information they have an attorney, we call them up and see that they get copies of the indictment. But we have no objection to mailing out copies of the indictment whenever the grand-jury returns them but usually, as I say, about 85 to 90 per cent of them are acquainted with the charges at the Commissioner's hearing.

THE COURT: Well, it would be a mighty simple matter, you have got to communicate with the Defendant telling him to be here this morning at 10 o'clock.

MR. BUFORD: That's correct.

THE COURT: It would be a mighty simple matter just to send him a copy of the indictment.

MR. BUFORD: No sir, I don't question Your Honor's suggestion or order to that effect; I don't question it; we can do it.

THE COURT: That's what I would like to have done.

MR. BUFORD: We'll start doing it.

THE COURT: For instance, right there in this situation, if the man already had a copy of the indictment, he might have already talked with a lawyer about it; but, as he said, he wants to see the indictment before he decides whether he wants to talk to a lawyer about it or not. It would simply expedite it, as I see it, the entire procedure if he's not represented by a lawyer to mail him a copy of the indictment at the same time you notify the man to be present.

MR. BUFORD: We will be glad to do that.

MR. JOHNSON: Your Honor, John L. Brown states he want a lawyer and could not afford one.

THE COURT: All right, put him under oath, Mr. Clerk. (Defendant John L. Brown sworn by Clerk)

DFET. BROWN: Me and him are going to try to get together and hire a lawyer.

THE COURT: That is what I understood you to say in the first place. Now, what I suggest is that, since both of you, you and the other Defendant Johns, It's going to take us another 45 minutes or an hour to complete the call of this calendar. Now, if you intend to hire a lawyer, make your arrangements and let's see if you are not in position to enter a plea this morning.

Now, Mr. Johns, you said something about us suggesting to you the name of a lawyer. We don't do that. There are a number of lawyers here in the court-room; there are a number of lawyers in Americus who are not here in the courtroom. You choose whatever lawyer you want to talk to. We don't ever suggest to anybody what lawyer that they are to have.

We'll come back to this case a little later.

. . . . . .

11:50 A.M., JANUARY 13, 1969:

THE COURT: All right, let's go back to No. 1618. All right, Mr. Brown and Mr. Johnson, you have selected Mr. Smith, I see, to represent you.

MR. JOHNSON: Your Honor, Mr. Smith has entered a plea of not guilty on behalf of John L. Brown and Cleveland Johns.

THE COURT: Now, I am sure Mr. Smith would like to know what you intend to do about the third defendant, R. L. Glass, who was not present when the case was called. Do you plan to try him at the same time?

MR. JOHNSON: At this time I don't believe so, Your Honor. We will see what we can do to have him present, of course. I will be in further contact with Mr. Smith concerning this case.

11:55 A.M., JANUARY 13, 1969.

GEORGIA BIBB COUNTY:

Foregoing pages numbered 1 to 9, both inclusive, CERTIFIED to be true and correct proceedings of arraignment at Americus, Georgia, January 13, 1969, in the case of United States of America v. John L. Brown, R. L. Glass and Cleveland Johns, Criminal No. 1618, in the United States District Court for the Middle District of Georgia, Americus Division.

This the 17th day of January, 1970.

CLAUDE JOINER, JR.
Official Reporter, U. S. Court
Middle District of Georgia

APPENDIX G

STATUTES INVOLVED

1. By writ of certiorari granted upon petition of any party to any civil or criminal cases, before or after rendition of judgment of decree. June 25th, 1948, c 646, 62 Stat. 928, 28 U.S. Code Section 1254. (1).

2. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment 14, United States Constitution (Adopted July 28, 1868).

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No. 1209

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN L. BROWN AND CLEVELAND JOHNS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
PHILIP B. MONAHAN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet App. 8–12) has not yet been reported.

JURISDICTION

The judgments of the court of appeals were entered on December 23, 1969 (Pet. App. 13–14). On January 26, 1970 (pursuant to a telegraphic request received by the Clerk on January 21), Mr. Justice Black extended the time for filing a petition for a writ of certiorari until February 21, 1970 (Pet. App. 15–16), and the petition was filed on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were denied due process in consequence of the circumstances attending their arraignment.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of possessing property intended for use in the production of nontaxpaid liquor, in violation of 26 U.S.C. 5686(a) (R. 1–2, 101). On January 29, 1969, petitioner Brown was sentenced to six months' and petitioner Johns to twelve months' imprisonment (R. 101–105). The court of appeals affirmed.

1. In late 1967 petitioner Johns arranged with a grocer in Marshallville, Georgia, to buy large amounts of sugar, wheat bran, and yeast. The arrangement contemplated that Johns would pick up and pay for the goods at the grocer's house in the early hours of the morning. Early on January 30, 1968, Johns drove past the grocer's house in a Ford automobile, returned to the house, loaded a box into the car, drove away, and returned again. He got out of the car, flashed a light around the area, and again drove away. Shortly thereafter Johns met petitioner Brown and one Glass (a codefendant who pleaded guilty) and the three drove to the house in the Ford and a Chrysler. After loading additional materials into the two automobiles, Glass left in one car and petitioners left in the other. An officer who had been watching the premises radioed other investigators when the men drove off. One group of officers stopped Glass and arrested him

when he attempted to flee. Other investigators arrested petitioners when their car, following a chase, ran into a tree. After Johns had been advised of his rights, he again attempted to escape and later denied that he knew Glass or that he had picked up supplies in Marshallville. Johns had a piece of paper in his billfold on which the name "Ed" and a telephone number were written. The number was that of one Ed Walters, a known liquor violator. The two automobiles, each of which was equipped with heavy duty overload springs, contained 79 bales of sugar, 400 pounds of wheat bran, and 46 pounds of yeast (Pet. App. 9–10; R. 12–13).

2. Petitioners, neither of whom had as yet retained counsel, appeared for arraignment in Americus, Georgia, at 10 a.m. on January 13, 1969. Neither petitioner was a resident of that city and neither, although the indictment had been returned five months previously (see R. 1), had as yet been furnished with a copy.[1] Upon learning that petitioners had not previously seen the indictment and upon being advised that it was their intention to engage an attorney but that they had

[1] It had been the practice of the government in this judicial district to mail copies of indictments in advance of the dates set for arraignments to the attorneys of defendants whom the government knew to be represented, but not similarly to provide unrepresented defendants, in advance of their scheduled arraignments, with copies of the true bills naming them as accused. The court, which learned in this proceeding that defendants who had not retained counsel were not being furnished with the indictments pertaining to them prior to their scheduled arraignment dates, directed the government to correct this aspect of its practice in the future (Pet. App. 20–22).

deferred doing so until they had seen what the charge was, the court continued the proceedings to give them the opportunity to hire and consult with a lawyer.[2] The court noted during the colloquy that it would take the court another 45 minutes or an hour to complete the morning's calendar call; that petitioners should try to find and advise with a lawyer while the court was attending to its other pending business; and that after it had completed the other business the court would see whether petitioners were in a position to enter their pleas. In response to a suggestion by one of the petitioners that the court refer them to a good local lawyer, the court advised that he never did that, noted that there were a number of lawyers present in the courtroom and that there were others in the city who were not in court, and said that it was up to petitioners to select any lawyer they wished. At 11:50 a.m., approximately an hour and three quarters later, the court, having finished its other business, returned to petitioners' case and was advised that during the interval petitioners had retained William E. Smith, a local lawyer, to represent them and that with the assistance of Mr. Smith they had entered pleas of not guilty (evidently before another judge) (Pet. App. 17–23).

Still represented by Mr. Smith, who so far as appears made no request for a continuance or otherwise indicated that he needed or desired more time in which to prepare for trial, petitioners were tried in a single-

[2] Petitioners had informed the court that it was their desire and intention to retain one attorney to represent them both (Pet. App. 19–20, 22).

day trial two weeks later (R. 3, 114). Attorney Smith also represented petitioners on appeal (R. 117).[3]

ARGUMENT

Petitioners' only contention is that they were denied due process by the totality of the circumstances in which they were called on to plead to the indictment. Having been summoned to appear for arraignment without previously having been served with copies of the indictment, in a locale with which they were unfamiliar, and at a time when they had not yet retained counsel, they say, they were required to employ counsel on too short notice, and too speedily to enter their pleas. The claim, which was presented to neither court below,[4] is insubstantial.

The district court made it adequately clear to petitioners that they were free to employ any attorney they chose; that they would not be required to plead to the indictment until after they had engaged and had had an opportunity to advise with counsel; and that they would be called on to enter their pleas that morning only if they were in a position to do so after those necessary preliminaries had been accomplished.

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[3] Petitioners' present attorney was first retained in connection with the proceedings in this Court.

[4] As petitioners point out (Pet. 4), the portion of the record relied on—the arraignment proceedings of January 13 (Pet. App. 17–23)—was not even transcribed until after the court of appeals' judgment (see Pet. App. 23). Nor did petitioners seek rehearing below on the basis of the matters now urged. Thus, as petitioners acknowledge, the arraignment proceedings were not before and were not considered by the court of appeals (Pet. 4). This consideration alone, we suggest, warrants refusal by this Court to review the matters here sought to be raised.

Moreover, since the pleas entered were denials of guilt, it is in any event not apparent how petitioners could possibly have been prejudiced. If there be an implication that petitioners might have selected a different lawyer if it had been more clearly brought home to them that they were not bound to choose one that morning, and that the hypothetical attorney might have represented them more effectively *at the trial* than the lawyer whom they retained, it is sufficient to note that there is no indication in the record that either petitioner felt he had had inadequate time to secure counsel. Neither is there any indication—nor do petitioners, indeed, suggest—that either was dissatisfied with their chosen attorney's services, including the representation afforded them at the trial. That petitioners were not dissatisfied with the attorney's performance is indicated by the fact that they continued his retainer on appeal.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

WILL WILSON,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

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